ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before Purchasing Unbundled Elements	**CCB Pol 97-4; CC Docket No. 96-98**

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION IN SUPPORT OF PETITION OF MCI FOR DECLARATORY RULING

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and Public Notice, DA 97-557, released March 14, 1997, TRA hereby submits its comments in response to the Petition for Declaratory Ruling filed by MCI Telecommunications Corp. in the above-captioned matter, and urges the Commission to declare that new entrants need not obtain separate license or right-to-use agreements as a precondition of purchasing unbundled elements from incumbent Local Exchange Carriers ("ILECs"). Any attempt to impose such an obligation upon

[1] A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or soon will be, offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier or competitive local exchange carrier retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."

requesting carriers would directly contravene a primary objective of the Telecommunications Act of 1996,[2] namely, the opening of the monopoly local exchange/exchange access markets to competitive entry through the elimination of "not only statutory and regulatory impediments to competition, but economic and operational impediments as well."[3]

By burdening their new entrant competitors with the obligation to engage in protracted and likely contentious negotiations with as many third-party vendors as the ILECs, in their sole discretion, dictate, the ILECs are also severely damaging a distinct and equally important goal of the 1996 Act, the promotion of small business endeavors in the provision of telecommunications services. Indeed, given the comparatively limited resources of many of the ILECs' potential competitors, imposition of the above burden will oftentimes completely foreclose the ability of requesting carriers to enter the local services market. This ploy by the ILECs is all the more invidious here, where the burden being shifted to requesting carriers is, ironically, the precise obligation which the Commission has indicated, in the context of infrastructure sharing, must be satisfied not by requesting carriers but by the ILECs themselves.

The Commission, which has staunchly championed the advancement of competitive entry generally, and in particular entry by small business entities, should not hesitate to take this opportunity to quash the latest in a long line of ILEC impediments to the advancement of local service competition by declaring that requesting carriers need not obtain third-party license or right-to-use agreements in order to purchase unbundled elements from ILECs. The Commission

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[2] Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act").

[3] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 3 (1996), *pet. for review pending sub. nom.* Iowa Utilities Board v. FCC, Case No. 96-3221 and consol. cases (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* ("Local Competition First Report and Order").

should also make clear that, in those rare circumstances where intellectual property or other proprietary information is implicated by ILEC provision of unbundled network elements, the obligation to obtain third-party vendor authorization rests solely with the ILEC, and that ILECs will not be permitted to evade their Section 251 obligations by delaying, or claiming the inability to obtain, such authorizations.

I.

ARGUMENT

A. ILEC Insistence that New Entrants Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements is Contrary to the Goals of the 1996 Act

Incumbent local exchange carriers find themselves in the unique and enviable position to exercise monopoly control over access to the network functionalities essential to the ability of competing telecommunications carriers to provide local telecommunications service to consumers. Noting in particular that "because an incumbent LEC currently serves virtually all subscribers in its local service area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of this market," the Commission has recognized that "the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets . . . is not sufficient to ensure that competition will supplant monopolies."[4] The Congress addressed this concern by mandating the elimination of "the most significant economic impediments to efficient entry" as well as removal of "existing operational barriers to entering the local market."[5] ILEC attempts to shift to new entrants the burden of

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[4] Id.

[5] Id. at ¶¶ 11, 16.

obtaining third-party authorization prior to purchasing unbundled elements provide a striking illustration of precisely the type of economic and operational entry barriers which the 1996 Act sought to eliminate and which the Commission should summarily preclude through issuance of the declaratory ruling sought by MCI.

In keeping with the 1996 Act's overarching purpose of "bring[ing] to consumers of telecommunications services in all markets the full benefits of vigorous competition",[6] Section 251 of the 1996 Act imposes certain unavoidable obligations upon ILECs, no matter how reluctant those entities may be, to facilitate the entry of competing telecommunications carriers, including the obligation to "provide access to 'unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide' a telecommunications service."[7] The Commission has left no doubt as to the scope of an ILEC's obligation pursuant to Section 251(c)(3):

> [T]his language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend. . . We also conclude that section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element.[8]

As MCI notes, with increasing frequency ILECs are seeking to avoid this obligation by imposing the burden of obtaining license or right-to-use agreements from each

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[6] Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended (First Report and Order and Further Notice of Proposed Rulemaking), Docket No. 96-149, FCC 96-489, ¶ 7 (released December 23, 1996).

[7] Local Competition First Report and Order, FCC 96-325 at ¶ 292.

[8] Id.

individual third-party vendor identified by the ILEC as supplying intellectual property or other proprietary information in connection with unbundled elements. In at least one instance, this onerous burden has been condoned by a State Public Utility Commission.[9] The ability to secure from incumbent local exchange carriers "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory" is a right granted by Section 251(c)(3) of the 1996 Act which neither a State nor any telecommunications carrier should be allowed to undermine.

The Commission is cognizant that "in some instances, it will be 'necessary' for new entrants to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information), because without such elements, their ability to compete would be significantly impaired or thwarted."[10] Further, the Commission has made clear that unless elements can be made available to the requesting carrier in a manner which does not contain the proprietary information, even elements containing such proprietary information must be provided:

> [W]e decline to adopt a general rule, as suggested by some incumbents, that would prohibit access to such elements, or make access available only upon a carrier demonstrating a heavy burden of need. . . the threat to competition from any such prohibition would far exceed any costs to consumers. . . We decline to adopt the interpretation of section 251(d)(2)(A) advanced by some incumbents that incumbent LECs need not provide proprietary elements if requesting carriers can obtain the requested proprietary element from a source other than the incumbent. Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants,

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[9] Ironically, this obligation is incorporated in Southwestern Bell's Statement of Generally Available Terms and Conditions for the State of Oklahoma, relied upon heavily by SBC Communications, Inc., in a Section 271 Application filed with the Federal Communications Commission on April 11, 1997.

[10] Local Competition First Report and Order, FCC 96-325 at ¶ 282.

and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.[11]

Reinforcing its conclusion that ILECs may not evade their Section 251 obligations by designating information contained in unbundled elements as "proprietary", the Commission has set a very high standard which ILECs must meet in order to avoid providing an unbundled element to a requesting carrier. Only by demonstrating to the Commission or a State commission both that a requested element "is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis" and that "a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network"[12] may an ILEC avoid providing the element.

Likewise, the Commission has concluded that ILECs should not be permitted to evade their statutory obligations "merely because their arrangements with third-party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers."[13] The Commission should issue a similar mandate here.

B. Requiring Eligible Carriers to Obtain License or Right-to-Use Agreements Constitutes an Impermissible and Nearly Insurmountable Barrier to Entry for Small Telecommunications Entities

The refusal of ILECs to fulfill their obligation to provide access to unbundled elements unless and until competitors satisfy onerous burdens not sanctioned by the 1996 Act

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[11] Id. at ¶¶ 282, 283.

[12] Id. at ¶ 283.

[13] Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996 (Report and Order), CC Docket No. 96-237, FCC 97-36, ¶ 65 (released February 7, 1997) ("Infrastructure Sharing Report and Order").

will effectively thwart the ability of many requesting carriers to provide competing local telecommunications services through one of the three major local entry vehicles envisioned by the 1996 Act -- the recombining of network elements obtained from ILECs to create "virtual local exchange networks". By engaging in this tactic, ILECs directly undermine the benefit to new entrants of an entry strategy particularly attractive to smaller carriers such as those which comprise the rank and file of TRA's membership and unduly restrict the local telecommunications options available to consumers.

The Congress enacted the 1996 Act to speed the advent of a "pro-competitive, de-regulatory national policy framework" which would serve as a solid foundation for the competitive offering of telecommunications services by established companies and new enterprises alike. In support of the development and rapid deployment of new and expanded telecommunications service options, the 1996 Act specifically mandates the identification and elimination of "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."[14] Likewise, the Commission has recognized the hurdles small carriers, as new entrants into the local exchange telecommunications market, would face in confronting entrenched incumbent providers possessed of not only monopoly power, but orders of magnitude greater resources, and has adopted national rules designed to "greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services and network elements to which they are entitled under the 1996 Act . . . national rules will reduce delay and lower transaction

[14] 47 U.S.C. § 257 (1996).

costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities."[15]

The necessity of entering into protracted negotiations with potentially each third-party vendor of an incumbent provider in an attempt to obtain the permission of those vendors before being allowed to purchase unbundled network elements will present a potentially insurmountable barrier to entry for many small telecommunications providers and thus stands in direct opposition to the clearly enunciated goals of both the Congress and the Commission. As TRA has demonstrated in this and other proceedings,[16] the hurdles facing small telecommunications service providers are myriad. Section 251 represents an attempt by the Congress to even the playing field so that smaller telecommunications providers will not be squeezed out of the telecommunications arena by firmly entrenched and more economically resourceful competitors. In its Infrastructure Sharing proceeding, the Commission has found that "[i]f qualifying carriers were required to negotiate licensing agreements with all of an [incumbent LEC's] equipment vendors, none of which have any incentive to negotiate reasonable terms or to act expeditiously with a small, rural carrier, it is reasonable to assume that the carrier's ability actually to use the [incumbent LEC's] infrastructure to serve its customers will be seriously impeded." TRA submits that the Commission's conclusion applies with equal force here, leading to the logical result that requesting carriers may not be compelled to seek license or right-to-use agreements with an ILEC's third-party vendor.

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[15] Local Competition First Report and Order, FCC 96-325 at ¶ 61 (footnotes omitted).

[16] *See* Comments of TRA, GN Docket No. 96-113, September 27, 1996; TRA letter to Don Russell, Chief, Telecommunications Task Force, Antitrust Division, U.S. Department of Justice, December 16, 1996.

C. In Fulfilling Their Obligation to Provide Access to Unbundled Network Elements to Requesting Carriers, the Commission Should Require ILECs To Obtain Directly from Their Third-Party Vendors Authority for the Unavoidable Use of Intellectual Property or Other Proprietary Information

In the Local Competition proceeding, the Commission addressed, and dismissed, the argument raised by certain ILECs that they are precluded from sub-licensing the use of certain software, such as that required to operate vertical switching features. After noting that "these incumbent LECs do not object to providing vertical switching functionalities to requesting carriers under the resale provision of section 251(c)(4)", the Commission continued

> Even if we accept the claim of U S West and Bell Atlantic that vertical features are proprietary in nature, these carriers do not meet the second consideration in our section 251(d)(2)(A) standard, which requires an incumbent LEC to show that a new entrant could offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC's network.[17]

In those rare circumstances where an ILEC is unable to provide an unbundled element through the provision of nonproprietary elements, the equities favor imposing the obligation to obtain license or right-to-use authority from a third party-vendor upon the ILEC which has already established a relationship with that third party-vendor and which, through a single negotiation, can secure for all requesting carriers the ability to utilize the intellectual property or other proprietary information as part of a requested network element. Indeed, imposing this obligation on an ILEC may be the only practical means of facilitating the cooperation of a third party-vendor since no countervailing deterrent will otherwise exist sufficient to offset the ILEC's clear economic incentive to maintain an exclusive license or right-to-use interest in such intellectual property.

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[17] Local Competition First Report and Order, FCC 96-325 at ¶ 419.

Accordingly, TRA urges the Commission to extend to Section 251 obligations its directive to ILECs in connection with Section 259's Infrastructure Sharing obligations:

> [W]e decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement section 259 agreements with qualifying carriers, *i.e.*, without imposing inappropriate burdens on qualifying carriers. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly. We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs.[18]

As the Commission emphasized there, in language directly pertinent here, "We merely require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259."[19]

II.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission issue a declaratory clearly stating (1) that LECs may not require requesting carriers to obtain license or right-to-use agreements as a condition to obtaining access to unbundled network elements and (2) that in circumstances where transfer of third-party vendor intellectual property or other proprietary information is unavoidable in order for ILECs to comply with their obligation to provide access to unbundled network elements pursuant to Section 251

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[18] Infrastructure Sharing Report and Order, FCC 97-36 at ¶ 70.

[19] Id.

of the 1996 Act, the responsibility for obtaining authorization from those third-party vendors for use of the intellectual property or other proprietary information rests solely with the ILECs.

Respectfully submitted,

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